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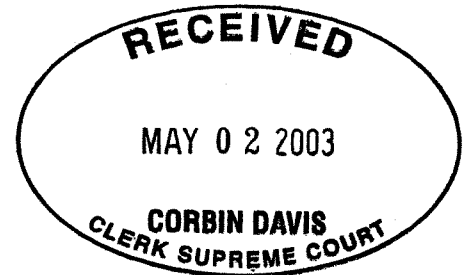
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MAY 05 2003

OFFICE OF  
THE CHIEF JUSTICE

Mr. Corbin Davis, Clerk  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

RE: ***Proposed Amendments to MCR 7.212***  
***ADM File No. 2002-34***



Dear Mr. Davis:

The proposal to amend MCR 7.212 to shorten the time for filing the appellant's brief from 56 days to 42 days after the transcripts are filed, and to eliminate stipulations for a 28-day extension of time is a bad idea. I vehemently oppose the proposed amendments.

I am a sole practitioner who exclusively practices criminal appellate defense. Most of my cases are appointed. Since joining the MAACS roster in 1991, I have handled 180 appeals out of nine counties: Oakland, Wayne, Macomb, Washtenaw, Livingston, Lapeer, Genesee, Monroe and St. Clair. In 2003, the vast majority of my cases have come from Wayne County, at the rate of one new case per week. Since 1997, I have been classified at MAACS' top level, Level 3, handling appeals in capital felony cases.

Unlike my civil practitioner counterpart, I have not handled my client's trial. When I receive the *Claim of Appeal and Order Appointing Counsel* in the mail (or when I pick it up at Wayne County Circuit Court), I know nothing about the case, other than the fact that my client was convicted of charges and the length of the sentence he or she is serving. While I could write my client to ask about what happened at the trial, most, if not all, of my clients are functionally illiterate and cannot respond to my letters. Collect telephone calls, which cost \$1.00 per minute, are cost prohibitive in appointed cases. Trial counsel is not always forthcoming or candid, especially when he or she may think a mistake might result in a successful claim of ineffective assistance of counsel. I cannot really learn about what went on during the case until I receive court records.

As an aside, I disagree that attorneys are part of the "delay" in the appellate process. It is my experience that court reporters are largely the cause of any "delay" prior to intake. In one case I handled (*People v Salem & Schreck*, COA No. 205746), it took over one year to get all of the transcripts filed, and that particular court reporter was show caused twice. In fact, certain court reporters are habitually late. Why does the Court's proposed "delay reduction" not address this problem? They still have 91 days to file transcripts in trial-based appeals.

Administrative Order 1981-7, Standard 3 requires appointed appellate counsel to interview the defendant in person at least once, "except in extraordinary circumstances." It is at this interview that I meet my client for the first time. My clients are incarcerated all over the state, from prisons as close as Mound or Ryan Correctional Facilities in Detroit to as far away as Ojibway Correctional Facility in the Upper Peninsula, near the Wisconsin state line. The importance of this face-to-face meeting cannot be emphasized enough. Many criminal defendants are suspicious of the system, and by extension, of the attorney appointed to represent them on appeal. The only way any sort of rapport can be established is through this meeting. However, if the Court adopts a 42-day briefing deadline, I will be forced to skip this meeting so that this arbitrary deadline is met. This would not be in my client's best interest.

In my eleven-plus years as a MAACS roster attorney, I have had to investigate potentially meritorious off-record issues raised during visits with my clients. Many of these issues involve witnesses not produced at trial who have to be located and interviewed to make an initial offer of proof. If I am forced to skip meeting with my client in person so that an arbitrary 42-day brief filing deadline can be met, my client loses the opportunity to raise these off-record issues on appeal. Further, even if my client was incarcerated at a facility close to my office, it is simply not possible, despite best efforts, to thoroughly investigate potentially meritorious off-record claims in time to file the brief within 42 days after the transcripts are filed.

Further, the arbitrary 42-day briefing deadline does not take into account the size of the lower court record. There is no such thing as a "one size fits all" appeal, yet the proposed amendments to MCR 7.212 make this very assumption. Capital felony trials are complex. One of my appeals had a transcript that was 4,500 pages long. It took me 30 full days to merely read through it. Generally, transcripts from murder and other capital felony trials average between 1,800 to 2,000 pages and sometimes take over one week to review. If the 42-day briefing deadline is adopted, I will likely be filing a lot of late briefs, and flooding the Court of Appeals with motions to restore oral argument. Neither action is in my client's best interests, and the Court could make better use of its time dealing with the substantive issues on appeal, rather than dealing with motions to restore oral argument.

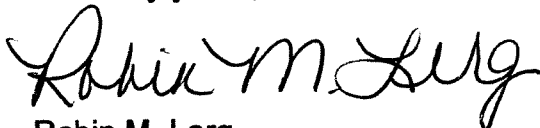
The proposed amendment will also have the unintended result of more "canned" briefs being filed, in the interest of adhering to the arbitrary 42-day deadline. Such action cannot be in any client's best interest, whether that client is a civil or criminal litigant. It is in the best interest of my clients, many who are serving life terms without any

possibility of parole, for me to file the best brief I can write. That will not happen if the amendments to MCR 7.212 are adopted. Contrary to opinions held by many, issues in criminal cases are not "simple," and do not tend to "repeat." One of the reasons why it takes longer to write a brief than it does to write an opinion is that the appellate attorney must begin with the raw record, analyze what the real issues are, and then present them in a coherent fashion. It was emphasized at the last Appellate Bench-Bar Conference that the appellate attorney's job was to educate the Court about the case. That will not happen if the briefing deadline is shortened to 42 days.

On a personal level, the proposed 42-day briefing deadline will devastate my practice and threaten my livelihood, because I will be forced to take on fewer cases if I have only 42 days, with no extensions, to file a brief in the Court of Appeals after the transcripts have been filed. The current 56-day deadline, with the current extensions available, are an essential time-management tool, and without them, I cannot make my schedule work. The current deadline and available extensions are necessary to accommodate unexpected events, whether they are personal or professional. Surely, the Court has not lost sight of the fact that most, if not all, attorneys, have lives outside the law?

While "speedy" resolution of cases is important, that goal cannot come at the expense of those people appearing before the Court. Chief Judge Whitbeck has made much ado in the legal press about how appeals take "too long," that the current deadlines are "overly generous," and that the 657-day average that it takes an appeal to wind its way through the Court of Appeals is "unreasonable." He should talk to my clients. None of the 180 people I have represented in the Court of Appeals have complained about the amount of time it takes for an appeal in the Court of Appeals to be resolved. In fact, they would rather wait two years for a decision that makes sense than get a quick, but incomprehensible per curiam decision. The Court should *not* adopt the proposal to reduce the time for filing the appellant's brief from 56 days to 42 days after the transcripts are filed and eliminate stipulations for a 28-day extension of time.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Robin M. Lerg". The signature is fluid and cursive, with the first name "Robin" being more prominent.

Robin M. Lerg

RML/jpl

Cc: Terence R. Flanagan, MAACS  
William C. Whitbeck, Chief Judge, Court of Appeals